IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 34 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.N.BHATT
and
HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PATEL ENGINEERING LTD.

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 34 of 2004
MR MITUL K SHELAT MR SHAKTISINH GOHIL and
Mr. Mihir Joshi for Petitioner No. 1-3
Mr.Kamal B.Trivedi, Addl.Adv.General with
Ms.Sangeeta Vishen, AGP for Respondent No. 1
MR AS VAKIL with Mr.S.B.Vakil for
Respondent No. 2

CORAM : HON'BLE MR.JUSTICE J.N.BHATT
and

HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 02/04/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE K.A.PUJ)

1. The petitioner has filed this petition under Article 226 of the Constitution of India praying for a writ of mandamus directing respondent no.1 to grant the contract no. Gujarat State Highway Project 10 for strengthening of State Highway 24-Rajkot-Morvi (KM 1/827 to KM 70/192) and paving of shoulders in favour of the petitioner. The petitioner has also prayed for a declaration that apprehended action of respondent no.1 -State of granting the above work to respondent no.2 as being contrary to the provisions of the tender notice and bidding instructions, settled norms regarding award of the tender contract, and hence, irrational, unreasonable, discriminatory and unconstitutional,

2. Before dealing with the case on hand, and before proceeding with the appreciation, examination and evaluation of rival contentions of the parties, it is necessary to have brief resume of facts of the case and the previous background of the matter, because of which, the present controversy arose before this Court.

3. A Loan Agreement was executed on 18-10-2000 between the Government of India and the International Bank for Reconstruction and Development ("the World Bank" for short) agreeing that the World Bank would lend to the Govt. of India on certain terms and conditions set forth in the Loan agreement, an amount equivalent to 381 million dollars ($ 381,000,000) for the purpose of the Gujarat State Highway Project ("GSHP" for short) provided in Schedule 2 to the said loan agreement. Section 1.02 (h) of the said loan agreement refers "Project Agreement" which means the agreement between the Bank and Gujarat of even date herewith, as the same may be amended from time to time, and such term includes all schedules and agreements supplemental to the Project Agreement. Section 2.03 refers to the closing date, which shall be December 31, 2005 or such late date as the Bank shall establish. It also says that the Bank shall promptly notify the borrower of such later date. Section 3.02 says that except as the Bank shall otherwise agree, procurement of the goods, works and consultants' services required for the Project and to be financed out of the proceeds of the loan shall be governed by the provisions of Schedule 1 to the Project Agreement. Schedule 2 gives

description of the Project which consists of Road Widening and Strengthening, Road Maintenance and Institutional Capacity Improvement.

4. On the same date i.e. 18-10-2000 a Project Agreement came to be executed in conjunction with the fulfillment of the terms and conditions of the Loan Agreement between the State of Gujarat and the World Bank. Schedule 1 of this Project Agreement talks about Procurement and Consultants' Services. Goods and works shall be procured in accordance with the provisions of Section 1 of the " Guidelines for Procurement under IBRD Loans and IDA Credits" published by the Bank in January 1995, and revised in January and August 1996, September 1997, and January 1999. This Project Agreement also refers to Employment of Consultants and as per the provisions contained in Part A of Section II, Consultants' services shall be procured in accordance with the provisions of the Introduction and Section IV of the " Guidelines: Selection and Employment of Consultants by World Bank Borrowers" published by the Bank in January 1997 and revised in September 1997 and January 1999.

5. Pursuant to World Bank Guidelines of Selection and Employment of Consultants by the World Bank Borrowers issued in January 1999, respondent no.1-State confirmed the appointment of one L.D. Lea International of Canada to undertake the consultancy services related to GSHP.

6. Respondent no.1-State thereafter issued on 13-2-2002, a Notice Inviting Tender (NIT) inviting bids from eligible contractors for awarding the contract work in question, the estimated cost of which was around Rs.116.7 crores and also for awarding as many as other 5 contracts. In response to the said NIT covering different contracts, respondent no.1-State received as many as 46 bids with voluminous record, each bid containing 5 big volumes, including addendum. A pre-bid meeting was thereafter held on 27-1-2003 between the bidders and respondent no.1-State for seeking proposed changes and/or modification/clarifications with regard to the contract in question. Pursuant to the said meeting and on the basis of the queries received, an addendum came to be issued by respondent no.1-State in the above referred tender documents and the Bill of Quantities (BOQ) was changed by issuance of the said addendum. All the 46 bids in respect of 6 contracts, including 7 bids for the contract in question were opened in the presence of the bidders and on preliminary scrutiny and announcement in respect of Summary Bill of Quantity (

BOQ), modifications, bid security, bid validity etc, was made whereupon, the bidders in case of the contract in question came to know about their order of ranking. Respondent no.2 was found the lowest bidder and the petitioner-JV was found L-2. The total bid price of respondent no.2 after discount and/or modification came to Rs.99,40,36,488/- whereas that of the petitioner came to Rs.99,69,63,682/-. After preliminary scrutiny of the tender documents on coming across the addendum a different position was found in case of the petitioner where total bid sum after applying modifications was coming to the tune of Rs.98,53,12,381/-. Respondent no.1 -State, therefore, wrote a letter on 19-6-2003 requesting the petitioner to agree with the details of error explained in the said letter with the rider that other aspects of the bid are under detailed examination and verifications. The petitioner immediately gave its concurrence vide letter dated 24-6-2003. In view of the further scrutiny of the bid documents and, more particularly, of form of bid, the petitioner was again requested vide letter dated 23-6-2003 by respondent no.1 -State to provide various information including confirmation that the requirements of addendum no.1 have been taken into account by the petitioner in its bid. The petitioner vide its letter dated 2-7-2003 confirmed that all the requirements of addendum no.1 have been taken into account in their bid.

7. During the detailed examination and scrutiny, it was found by respondent no.1-State that the petitioner had quoted two different rates for the very items - one in the original bid documents, and the other in the addendum and that it had filled in, both original pages of the bid documents as well as addendum and quoted rates in original BOQ by making hand-made modifications as per the addendum, and in certain units of quantities in original BOQ. The consultant of respondent no.1-State after taking into account all the aspects of the matter including responsiveness of the bid came to the conclusion that the bid of the petitioner was not substantially responsive, and therefore, the consultant recommended that the bid of respondent no.2 was the lowest substantially responsive bid. Respondent no.1 -State thereafter, furnished all the requisite documents to the World Bank on 10-12-2003. Several correspondence, e-mails etc. were exchanged between the World Bank and respondent no.1 -State and ultimately, the World Bank has given its no objection on 31-12-2003 for the award of the contract in favour of respondent no.2. Respondent no.1-State thereafter issued a letter of acceptance on 2-1-2004 awarding the contract in favour of respondent

no.2.

8. Since the petitioner was of the view that its bid was the lowest one it was awaiting formal communication for acceptance of offer and execution of agreement. However, respondent no.1-State did not invite the petitioner for acceptance nor sought any clarification especially when all the other contracts in respect of which the process was undertaken simultaneously were awarded in favour of the lowest number qualified bidder. In respect of the contract in question, the respondent sought extention of the bid validity date, initially on 8-9-2003, and thereafter, on 7-11-2003 and the last date as extended was 10-1-2004. The petitioner was apprehending that the delay in the acceptance of the offer was only with a view to favour respondent no.2 who was the second lowest bidder and the petitioner also came to know about the initiation of the process for awarding the contract in favour of respondent no.2, and hence, the present petition was filed before this Court.

9. Initially, the Court issued a notice on 6-1-2004 and observed that since the notice has been issued, it was expected that the Government would stay its hands till the next date. On the first returnable date i.e. 12-1-2004, the Court was informed that the letter of acceptance has already been issued by respondent no.1 -State in favour of respondent no.2 on 2nd January, 2004. However, hope was again expressed by the Court that no further action would be taken by respondent no.1 -State, and in view thereof, the matter has rested with the issue of letter of acceptance dated 2-1-2004. Respondent no.1-State thereafter filed its affidavit-in-reply on 27-1-2004. The petitioner had submitted a draft amendment dated 29-1-2004 which was partly objected by respondent no.2. The petitioner sought production of the Project Agreement, the Loan Agreement, the World Bank Guidelines, the Bid Evaluation Report, the letter of respondent no.2 dated 23-6-2003 to the State Government, the reply dated 27-6-2003 of the Government of Gujarat to respondent no.2, e-mail dated 30-12-2003 from the Government of Gujarat to the World Bank and the fax message dated 31-12-2003 from the World Bank to the Gujarat State conveying no objection to the award of the contract to respondent no.2. All these documents were produced by respondent no.1 alongwith an affidavit dated 3-2-2004. The petitioner had filed its affidavit-in-reply dated 6-2-2004 to respondent no.1's further affidavit dated 5-2-2004 and rejoinder to the affidavit-in-reply dated 5-2-2004. Respondent no.1-State filed its rejoinder dated 7-2-2004 and respondent no.2

filed its reply dated 10-2-2004. The petitioner had filed further affidavit dated 11-2-2004 in rejoinder to the second reply dated 10-2-2004. The matter was heard at length for several days and it was agreed between the parties that the hearing be treated as final hearing of the matter and the written submissions and/or written arguments on behalf of the respective parties were taken on record.

10. Mr. Mihir Joshi, learned Advocate appearing for the petitioner has raised the first and foremost contention to the effect that the petitioner-JV has offered the lowest evaluated bid price and there was no legal or justifiable reason not to award the contract to the petitioner. He has further submitted that the evaluated bid price of the petitioner was Rs.98,53,12,381/- as per the letters dated 19-6-2003 and 24-6-2003, while the similarly evaluated bid price of the successful bidder i.e. respondent no.2 is Rs.99,38,37,989/- on which amount the contract has been awarded to respondent no.2 by respondent no.1-State vide letter dated 2-1-2004. He has further submitted that it is not even the case of respondent no.1 -State that despite being the lowest bidder, it was thought fit or proper to award the contract to respondent no.2 for any reason whatsoever. He has further submitted that the issue as to whether the State can in its discretion ignore the lowest bid for awarding contract does not arise. He has invited the attention of the Court to Clause 33 of ITB which emphasizes that the contract would be awarded to the bidder whose bid is substantially responsive and who has offered the lowest evaluated bid price. He has also invited the Court's attention to Clause 2.58 of the Guidelines which emphasizes the very same aspect. Moreover, in other contracts which were part of the same tender notice, contracts have been awarded to the lowest bidders. He has further submitted that Clause 34 of ITB which reserves a right to the employer to reject or accept any bid cannot be read as giving an absolute discretion to the employer. Similarly, item 7 of form of bid in Section 7 of the bid documents does not reserve the absolute right on the employer to reject the bid; nor does it preclude a bidder from challenging an arbitrary action of the employer regarding rejection or acceptance of bid. He has further submitted that respondent no.1-State could not have ignored the letter to the petitioner dated 24-6-2003 confirming the evaluation bid price, or in any case, respondent no.1-State ought to have asked for clarification under Clause 27 of ITB to clarify any purported ambiguity about such price, before awarding the

contract to respondent no.2.

11. Mr. Joshi has further submitted that the decision of respondent no.1 to reject the bid of the petitioner initially on the ground that it was not substantially responsive on account of multiple bid, then on the ground that the petitioner had resorted to unfair practice and finally also on the ground that there was material deviation in the bid of the petitioner whose rectification would have unfairly affected the competitive position of other bidders is absolutely unreasonable since it ignores the very nature of the error and it is contrary to conditions of the ITB, and therefore, invalid and illegal. As far as the allegation regarding multiple bidding is concerned, Mr. Joshi has submitted that in the evaluation report, respondent no.1 no.1-State has submitted that filling up the original pages of the bid documents and the addendum pages was a case of multiple bidding. This is, however, not correct. Clause 6 of ITB prescribes that there should be one bid per bidder and a bidder who submits or participates in more than one bid will cause all the proposals in which the bidder has participated to be disqualified. The form of bid is in Section 7 of Volume II of ITB. Admittedly, the petitioner has submitted only one bid and has not directly or indirectly participated in more than one bid. Therefore, there was no disqualification incurred under the said clause. Mr. Joshi has further submitted that the error of petitioner in filling up the original pages in the bid documents and the substituted pages in the addendum does not amount to multiple bidding as contemplated under Clause 6 of ITB. Making the correction would merely change the amount in the form of bid which cannot be true in every case of correction including that in the bid of respondent no.2 whose bid was corrected from Rs.99,40, 36, 488/- to Rs.99,38, 36, 989/- without considering it as multiple bidding. Mr. Joshi has further submitted that, in any case, in view of Clause 9, 11 and 19.4 of ITB an addendum modifies the bid document and the original pages are deleted, and therefore, redundant for all purposes, and there is no question of considering amounts filled in in the original pages while evaluating the bids. Mr. Joshi has further submitted that the bid of the petitioner could not have been determined to be not substantially responsive on account of multiple bidding since it is an extraneous consideration to such determination as the parameters of responsiveness are defined in Clause 28.2 of the ITB which do not include multiple bidding. Mr. Joshi has further submitted that as per Clause 6 multiple bids are to be rejected at the first stage itself and admittedly

respondent no.1 who was aware of the error in the bid had not rejected the bid of the petitioner which establishes that this was an after thought.

12. As far as the allegation of unfair practice is concerned, Mr. Joshi has submitted that in the evaluation report, respondent no.1-State has stated that by filling up both the original bid pages and the addendum pages, the petitioner could take undue advantage of post opening of tender since it knew the price of other bidders and had the advantage of agreeing or disagreeing with arithmetic corrections under Clause 29.2 of ITB. Mr. Joshi has submitted that this conclusion of respondent no.1-State is absolutely irrational inasmuch as on account of Clauses 9,11, and 19.4 of the ITB, the original pages of the bid document stood substituted and the bid documents stood modified by the addendum, and therefore, the pages of the original bid document became redundant for all purposes, and there was no option to a bidder to refer to the pages of the original bid documents for any purpose. Mr. Joshi has further submitted that under Clause 29.2 of ITB, there is no option to the bidder to agree or disagree with the corrections made by respondent no.1 and in case it is not accepted, the bid of such bidder would be rejected, and therefore, the entire hypothesis of respondent no.1 regarding unfair practice was baseless and irrational. Mr. Joshi has further submitted that this ground of unfair practice was admitted to be improved upon in the additional affidavit by stating that the confirmation of price was not binding on respondent no.1-State and that the petitioner had confirmed by letter dated 2-7-2003 that its bid has taken into consideration the figures mentioned in the addendum. He has, therefore, submitted that the stand of respondent no.1 that corrections were not binding on respondent no.1 did not support the allegation that the petitioner had sought to take undue advantage as alleged earlier, and it is therefore self defeating. The confirmation of addendum was a routine communication addressed to a number of other bidders and the letter dated 2-7-2003 was after confirmation of corrected price after taking into consideration the addendum given by the petitioner vide letter dated 24-6--2003, and therefore, not unfair or misleading at all. Mr. Joshi has further submitted that the term unfair practice is very vague and ambiguous and devised by the defendant no.1-State to cover its ipse dixit under Clause 39 of the ITB which refers to corrupt or fraudulent practices and which can invite rejection of the bid. It is not the case of respondent no.1-State that the petitioner has adopted any of such practices.

The tender of the petitioner, therefore, could not have been rejected on such a vague ground which is not even contemplated under the ITB.

13. As far as the allegation of material deviation is concerned, Mr. Joshi has submitted that it was an improvement made in the affidavit over the reasons assigned in the evaluation report considering filling of the original and substituted pages by the petitioner as a material deviation whose rectification would unfairly affect the competitive position of other bidders. He submitted that this reason is not indicated in the contemporaneous record being the evaluation report and the bid of the petitioner has not in fact been rejected on this ground at all. He has further submitted that the interpretation of respondent no.1-State is rather mischievous and incorrect to its knowledge. Material deviation is a known term in commercial parlance. What Clause 28.2 contemplates is a deviation which if accepted would either (a) affect substantially the scope, quality or performance of the work or (b) limit substantially the employers' rights or bidders obligations under the contract or (c) whose rectification would unfairly affect competitive position of other bidders. The rectification contemplated is only after the deviations were hypothetically to be accepted and not any rectification prior to evaluation since that would bring the correct picture to the forefront and certainly not unfairly affect the competitive position of other bidders. He has further submitted that the error in the bid is arithmetical as confirmed by respondent no.1 in letters dated 19-6-2003 and 10-12-2003, and therefore, cannot be considered to be material deviation at all.

14. Mr. Joshi has further submitted that the decision to reject the bid of the petitioner as not being substantially responsive on account of having filled up prices both in the original pages of the bid document and the substituted pages in the addendum is not bona fide, got up subsequently, as an afterthought and with a view to favour respondent no.2. In support of this proposition he has submitted that respondent no.1 has contended that substantial responsiveness of the bid had not been determined at the time of issuance of letter dated 19-6-2003 and as stated in the affidavit-in-reply paragraphs 3.12, 3.14 and 3.15 that initially the letter was written, but thereafter on microscopic scrutiny of tender documents the filling of price in the original documents by making hand-made modification and also in the addendum was noticed. Similar averment is made in paragraphs 4.4 and 9 of the further affidavit. Mr.

Joshi has submitted that the contention of respondent no.1 that it was not aware of the exact error at the time of issuance of letter dated 19-6-2003 and that it had only proceeded on the summary BoQ is false because the said letter itself refers to corrections in item no.6.026 and item no.6.458 which are errors of multiplication and not reflected in the summary BoQ, meaning thereby, that respondent no.1 has gone through every line of the summary BoQ and thereafter, issued the letter dated 19-6-2003. Moreover, each page of the original bid is stamped by the Superintending Engineer on 17-5-2003. Mr. Joshi has further submitted that in the bid valuation report submitted by respondent no.1, in paragraph 7 regarding substantially responsive bid, it is stated that for substantially responsive bid a thorough check was carried out upon the price BoQs and check for arithmetical errors, and the bidders whose bids contained errors were requested to confirm the correct amounts as per ITB Clause 29.2. He submitted that admittedly such letters were written to the bidders on or immediately around 19-6-2003. Respondent no.1 has suppressed the fact that similar letter was addressed to the petitioner also and confirmation was obtained. This confirms that when the said letter was written to the petitioner and others substantial responsiveness of all the bids had already been determined. That such determination for the bidders was taken up at any time after 19-6-2003 and contentions to the contrary are not borne out from the record. Mr. Joshi has further submitted that there is a presumption that respondent no.1 would have acted in accordance with the ITB conditions. It is only after bids are determined to be substantially responsive under Clause 28 of ITB that correction of errors is undertaken in terms of Clause 29 thereof. The contention of respondent no.1 that it had not adhered to this is self serving and unbelievable since respondent no.1 has not produced any record or made any averment as to when bids of all the bidders were taken up for examination and determination of responsiveness under Clause 28 of ITB.

15. Mr. Joshi has further submitted that favouritism shown to respondent no.2 is evident from the letter dated 23-6-2003 of respondent no.2 indicating beyond doubt that it has interfered with the evaluation of bids and has been permitted to examine the bid of the petitioner and note down prices of all items and total the amount with individual calculation for each item in the presence of the Superintending Engineer and make personal representations to respondent no.1, which is finally borne out. Mr. Joshi has further submitted that the decision of respondent no.1 to award the contract to respondent no.2 is not saved from the vice of

irrationality and illegality merely because it is on the recommendation of a consultant or that the World Bank has given its no objection to such award, particularly in the context of the facts that respondent no.1 has deliberately made vague reporting regarding the role, reports and scope, nature and timing of inquiry by the consultant, and the facts that incorrect and misleading information has been furnished to the World Bank. In support of this proposition, he has submitted that respondent no.1 has not produced the entire record of the consultant, nor indicated whether there are any other reports though called upon to be shown and has also not given specific dates in respect of examination of bids and report of the consultant. In any case, if as per the say of respondent no.1 the consultant was involved in the evaluation of bids, letter dated 19-6-2003 was obviously with its knowledge. The so called opinion of the consultant appears to have been generated by respondent no.1 to give a facade of rationality to the impugned decision. In any case, evaluation of bids is a decision of the employer which is called in question in the present petition. There is no practical assessment involved which would require any weightage to be given to the consultant's report. He has further submitted that in the evaluation report, the petitioner has deliberately and incorrectly indicated to be the second lowest bidder after correction of arithmetic errors. However, the price stated of Rs.99,59,59,921/has never been informed to the petitioner nor is any concurrence sought. Respondent no.1, therefore, could not have made any unilateral corrections. It is further submitted that the evaluation report has been deliberately worded in a manner so as to create a false impression that responsiveness to commercial aspect of bid documents was undertaken before arithmetic check/corrections , that the bid of the petitioner was found to be non-responsive and excluded from arithmetic check and on receipt of confirmation of the correct amounts from the remaining bidders, respondent no.2 was found to be lowest. Mr. Joshi has submitted that the petitioner was identically situated as the six bidders whose bids are stated to be found to be substantially responsive as a result of which arithmetical corrections were undertaken, confirmation obtained and whose names appear in the title of the report. Despite this the name of the petitioner was excluded from the table which would have been clearly demonstrative that its price was the lowest. Mr. Joshi has further submitted that no objection of the World Bank is therefore based on misleading and incorrect information and cannot shield the impugned decision. Mr. Joshi has finally submitted that the bid of respondent

no.2 deserves to be rejected since its own letter dated 23-6-2003 records personal discussions with respondent no.1, examination of the bid of the petitioner by respondent no.2, noting down prices of the bid of the petitioner and making representations that the petitioner was the second lowest bidder which is contrary to Clause 26.1 of ITB. Mr. Joshi has therefore submitted that this Court should come to the conclusion that the contract could not have been awarded to respondent no.2 since the petitioner's bid has wrongly been rejected and the petitioner would be entitled to the award of the contract, and therefore, respondent no.1 should immediately be directed to undertake the completion of formality in form of intimation to the World Bank.

15.1. In support of his submissions, Mr. Joshi has relied on the decision of the Hon'ble Supreme Court in the case of Tata Cellular vs. Union of India ((1994) 6 S.C.C. 651), and extensively read the observations made therein with regard to Court's judicial power of reviewing the administrative decision of the Government and its duty while deciding the question of legality of such decision. After classifying the grounds, namely, illegality, irrationality and procedural impropriety, upon which an administrative action is subject to control by judicial review, the Court observed that these are only the broad grounds but it does not rule out addition of further grounds in course of time. The Court has also taken note of the possible recognition of principle of proportionality, and further observed that two other facets of irrationality may be mentioned: (1) It is open to the Court to review the decision-maker's evaluation of the facts. The Court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld. (2) A decision would be regarded as unreasonable if it is not impartial and is unequal in its operation as between different classes.

15.2. Mr. Joshi has further relied on the decision of the Hon'ble Supreme Court in the case of M.I. Building Pvt.Ltd. ((1999) 6 SCC 464), wherein it is held that every decision of the authority except the judicial decision is amenable to judicial review and reviewability of such a decision cannot now be questioned. However, a judicial review is permissible if the impugned action is against law or in violation of the prescribed procedure or is unreasonable, irrational or mala fide. Mal-governance sets a bad example.

15.3. Mr. Joshi has further relied on the decision of the Hon'ble Supreme Court in the case of Union of India and Others vs. Dinesh Engineering Corporation and Another ((2001) 8 SCC 491),wherein it is held that even if any power is conferred on the authorities either in Government contracts or guidelines issued in this regard, whereby any tender offer can be rejected without assigning any reasons or to accept or not to accept the lowest offer, such a power must be exercised within the scope of the object of the relevant Clause and not arbitrary. Any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision and violative of the mandate of Article 14 of the Constitution of India.

16. Mr. Kamal B.Trivedi, learned Additional Advocate General appearing for respondent no.1 -State strenuously objected to granting any relief whatsoever to the petitioner and submitted that the petition deserves to be dismissed at the very threshold with compensatory costs. It was submitted that letters dated 19-6-2003 and 23-6-2003 are in fact the letters written by respondent no.1-State seeking concurrence, clarification and information from the petitioner and the same suggest that the process of determining the responsiveness of the respective bids was going on at the material time and no decision in that regard was taken at that time. He has further submitted that merely because the said letter dated 19-6-2003 was stated to have been written pursuant to ITB Clause 29, the provisions of Clause 29 would not automatically be attracted, since in substance, the said letter was not written in respect of any arithmetical error as explained in Clause 29.2 of ITB. In fact, the said letter was written while seeking clarification/concurrence since as a result of further scrutiny of the addendum filled in by the petitioner, different position emerged on the strength of the said addendum in contrast to the position which had emerged at the time of bid opening on 17-5-2003 wherein respondent no.2 was found L-1 whereas the petitioner was found L-2. This aspect of the matter was further supported by caveat/rider contained in the said letter stating that the other aspects of the bid are currently under detailed examination and clarification. Mr. Trivedi has further submitted that the petitioner while relying on the aforesaid letter of respondent no.1-State, vide its letter dated 24-6-2003 had also provided desired clarification and has also confirmed that all the requirements of the addendum have been taken into account

in its bid. The resultant effect of the said confirmation was to take into account what was stated by the petitioner in summary BoQs alongwith form of bid whereby the petitioner's bid was not lower than that of respondent no.2. Mr. Trivedi has further submitted that the action of respondent no.1-State in writing the said letter dated 19-6-2003 seeking concurrence from the petitioner cannot create any estoppel and/or bar against respondent no.1-State in taking a view on the basis of subsequent detailed evaluation of the bid which proved that the petitioner's bid was not substantially responsive. Even otherwise, as per Clause 28.2 (c) of ITB allowing the petitioner to rectify in this behalf would have affected unfairly the competitive position of other bidders which amounts to a material deviation which cannot subsequently be made responsive by withdrawal of deviations etc. as per Clause 28.3 of ITB.

17. Mr. Trivedi has further submitted that it was only in the month of December,2003 that responsiveness of the bids came to be finally determined and the petitioner's bid was not found substantially responsive by the consultants as per their bid evaluation report, and more particularly, owing to the following reasons: (i) The petitioner deviated from the ordinary course of bid when it had filled up two different rates - one in original bid and another in addendum, for the very items. (ii) The petitioner tried to manipulate when it made hand-made corrections in the original BoQs in respect of items for which addendum was issued, which amount to fraudulent practice inviting rejection of bid. (iii) The above phenomenon is also suggestive of a case of multiple bidding since the petitioner has filled in both, original pages of bid documents as well as addendum(unlike other bidders including respondent no.2) by taking recourse to a method of quoting two different rates for the very items. (iv) As per the Consultant's opinion, allowing rectification at a belated stage in case of the petitioner would affect unfairly, the competitive position of other bidders and that therefore as per Clause 28.2 (c) of ITB, petitioner's bid was rightly held to be not substantially responsive; and as per Clause 28.3, such a bid cannot substantially be made responsive by correction or withdrawal of nonconforming deviation or reservation. In this connection Mr. Trivedi has relied on the decision of the Supreme Court in the case of West Bengal State Electricity Board vs. Patel Engineering Co.Ltd (AIR 2001 SC 682), wherein it has been held that in the case of project undertaken for the benefit of public it has to be seen that the mode of execution of the work of the project should also ensure that the

public interest is best served. Tenders are invited on the basis of competitive bidding for execution of the work of the project as it serves dual purposes, on the one hand it offers a fair opportunity to all those who are interested in bidding for the contract relating to execution of work, and on the other hand it affords the authorities a choice to locate the best of the competitors on competitive price without prejudice to the quality of the work. Above all it eliminates favouritism and discrimination in awarding public works to contractors. The contract is, therefore, awarded normally to the lowest tenderer which is in public interest. The principle of awarding contract to the lowest tenderer applies when all thing s are equal. It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. Merely because a bid is the lowest, the requirements of compliance of the rules and conditions cannot be ignored. The Court has come to the above finding after narrating the entire facts pointing out the errors committed by the aggrieved tenderer and interpreting a similar process of the tender document. The Court was of the view that the errors pointed out were not simply arithmetic and clerical mistake but a deliberate mode of splitting the bid which would amount to rewriting the entries in the bid document and cannot be treated as non material.

18. Mr. Trivedi further submitted that the petitioner had at no point of time come forward either before respondent no.1-State or before this Court with a clear explanation/admission that it had filled in both original pages of bid documents as well as addendum by taking recourse to the method of quoting two different rates in respect of the same items. Thus, the petitioner was guilty of suppression of the said aspect of the matter. It is, therefore, submitted that this Court should not lose sight of the conduct of the party coming before the Court challenging the decision making process of respondent no.1-State for awarding the contract which does not inspire any confidence in respondent no.1-State and that the State is entitled to exercise its discretion for taking a view as to whom the contract should be awarded subject to the confirmation by the World Bank. In this connection, Mr. Trivedi relies on the judgment of the Honourable Supreme Court in the case of Rajasthan Cooperative Diary Federation LTD. VS. Mahalaxmi Mingrate Marketing Service Pvt.Ltd.and Others ((1996) 10 SCC 405), wherein it is held that: " If the conduct of respondent no.1 was such that it did not inspire any confidence in the appellant, the appellant was entitled to decline entering into any legal relationship with

respondent no.1 as its selling agent. The Letter of Intent merely expressed an intention to enter into a contract. If the conditions stipulated in the Letter of Intent were not fulfilled by respondent no.1, and if the conduct of respondent no.1 was otherwise not such as would generate confidence, the appellant was entitled to withdraw the Letter of Intent. There was no binding legal relationship between the appellant and respondent no.1 at this stage and the appellant was entitled to look at the totality of circumstances in deciding whether to enter into a binding contract with respondent no.1 or not."

19. Mr. Trivedi has further submitted that when the official institutions like World Bank grant huge loans they always insist that any project for which the loan has been sanctioned, must be carried out in accordance with specifications, and within the scheduled time and the procedure for granting the award must be duly adhered to, and that therefore, on getting the bid evaluation report, NOC and/or approval granted by the World Bank in the matter of award of contract in favour of respondent no.2, cannot be said to be either arbitrary or capricious or illegal requiring this Court to interfere in the matter of award of contract. In this connection, he has relied on the decision of the Honourable Supreme Court in the case of Air India Ltd. vs. Cochin International Airport Ltd. ((2000) 2 SCC 617), wherein it is held that : " In arriving at a commercial decision, considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decisionmaking process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its Corporations. instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the Court must exercise its discretionary power under Article

226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point."

20. Mr. Trivedi has further relied on the decision of the Honourable Supreme Court in the case of Asia Foundation & Construction Ltd v. Trafalgar House Construction (I) Ltd. ((1997) 1 SCC 738), wherein it is held that: " In this case none of the criterion has been satisfied justifying court's interference in the grant of contract in favour of the appellant. It is difficult for the country to go ahead with such high cost projects unless the financial institutions like World Bank or the Asian Development Bank grant loan or subsidy, as the case may be. When such financial institutions grant such huge loans they always insist that any project for which loan has been sanctioned must be carried out in accordance with the specification and within the scheduled time and procedure for granting the award must be duly adhered to. In the aforesaid premises on getting the evaluation bids of the appellant and respondent no.1 together with the consultant's opinion after the so called corrections made the conclusion of the Bank to the effect " the lowest evaluated substantially responsive bidder is consequently AFCONS" cannot be said to be either arbitrary or capricious or illegal requiring court's interference in the matter of award of contract. It is, therefore, not necessary to enter into the controversy as to whether any mistake was committed by the consultant in the matter of bid evaluation in not taking into account the customs duty and whether the High Court committed a factual error in coming to the conclusion that respondent no.1 was the lowest bidder. In the matter of a tender, a lowest bidder may not claim an enforceable right to get the contract though ordinarily the authorities concerned should accept the lowest bid."

21. Mr. Trivedi has further submitted that none of the actions of respondent no.1-State can be said to have been vitiated by mala fides and even otherwise, in absence of evidence in that behalf or even an averment in that behalf, no mala fide can be attributed against respondent no.1-State in the whole matter. For this purpose, he relies on the decision of the Honourable Supreme Court in the case of State of Maharashtra vs. Dr. Bubhikota Subba Rao ((1993) 3 SCC 71), wherein it is held that: " Mala fides violating the proceedings may be legal or factual. Former arises as a matter of law where a public functionary acts deliberately in defiance of law without any malicious intention or improper motive whereas the latter is actuated by extraneous

considerations. But neither can be assumed or readily inferred. It requires strong evidence and unimpeachable proof."

22. Mr. Trivedi has further relied on the decision of the Honourable Supreme Court in the case of Kumaon Mandal Vikas Nigam Ltd. vs. Girija Shankar Pant (AIR 2001 SC 24), wherein it is held at paragraphs 10 and 11 that:

"10. The word `Bilas' in popular English parlance stands included within the attributes and broader purview of the word `malice', which in common acceptation mean and imply `spite' or `ill-will'(Stroud's Judicial Dictionary (5th Ed.) Volume 3) and it is now well settled that mere general statements will not be sufficient for the purposes of indication of ill-will. There must be cogent evidence available on record to come to the conclusion as to whether in fact there was existing a bias which resulted in the miscarriage of justice."

"11. While it is true that legitimate indignation does not fall within the ambit of malicious act, in almost all legal enquiries, intention, as distinguished from motive is the all-important factor, In common parlance a malicious act has been equated with intentional act without just cause or excuse."

23. Mr. Trivedi has further submitted that there is a need to allow for certain flexibility in administrative decision-making process and if a reasonable procedure has been followed therein, the same cannot be challenged. Decision-making process in the matter of award of contract can be challenged only on Wednesbury principle of unreasonableness (i.e. unless the decision is so unreasonable that no sensible person would have arrived at such a decision) coupled with arbitrariness, favouritism for use of power for collateral purposes. None of the vices is present in the instant case, and therefore, even in public interest, the decision taken by respondent no.1 does not call for any interference by this Court while exercising its extraordinary writ jurisdiction under Article 226 of the Constitution. For this purpose, he relies on the decision in the case of Raunaq International Ltd. vs. I.V.R. Construction Ltd. (AIR 1999 SC 393), wherein it is held that: " Where there is an allegation of mala fidees or an allegation that the contract has been entered into for collateral purposes, and the Court is satisfied on the material before it, that the allegation needs further examination,

the Court would be entitled to entertain the petition. But even here, the Court must weigh the consequences in balance before granting interim orders. Where the decision-making process have been structured and the tender conditions set out the requirements, the Court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the Court should hesitate to intervene."

24. In above view of the matter, the submissions made and authorities relied upon, Mr. Trivedi has urged the Court to dismiss the petition without showing any indulgence in the matter.

25. Mr. S.B.Vakil, learned Senior Counsel appearing for respondent no.2. submits that the issues that have arisen in the present petition are not bilateral questions between the petitioner and respondent no.1 , but are multilateral issues between respondent no.1-State and all other bidders. The petitioner's only argument is that the Superintending Engineer's letter dated 19-6-2003 and its concurrence vide its letter dated 24-6-2003. and in view of ITB Clause 28.1, respondent no.1-State must be assumed to have decided that the petitioner's bid was substantially responsive to the bid documents, that thereafter respondent no.1-State had no right to take a view to the contrary. and that it was only after gross delay of about six months, on 10-12-2003 respondent no.1-State mala fide took the view that the petitioner's bid was not substantially responsive to the bid documents. Mr. Vakil has submitted that the Superintending Engineer is merely a cog in the wheel of respondent no.1-State to perform certain administrative functions e.g. making inquiries from bidders, collecting information etc. in the process of evaluation of bids. The bilateral conduct of the Superintending Engineer and the petitioner cannot take away the right of other bidders to challenge the petitioner's bid as not substantially responsive to the bid documents or not the lowest evaluated bid.

26. Mr. Vakil has further submitted that the petition contains materially false statement to the knowledge of the petitioner and the petition is liable to be dismissed on the said ground alone. For instance, it has been pointed out in the petition, that under the tender notice, the contract is to be awarded to the lowest bidder, however, it has not been so provided in

the tender notice. The petitioner's entire case in the petition was that it was entitled to the award of the contract, because it was the lowest bidder. The guidelines issued by the World Bank says that the borrower shall award the contract, within the period of validity of bids to the bidder, who meets the appropriate standards of capability and resources and whose bid has been determined (i) to be substantially responsive to the bid documents and (ii) to offer the lowest evaluated cost. Clause 34 of the tender documents also reiterates the same requirement. Even the petitioner itself in its form of bid had stated that it is understood by the petitioner that respondent no.1-State is not bound to accept the lowest or any bid that may be received by respondent no.1-State.

27. Mr. Vakil has further submitted that the petitioner has suppressed relevant and material facts in the petition. In this connection, he has submitted that the petitioner in support of its case that the petitioner is the lowest bidder, had placed reliance on the Superintending Engineer's letter dated 19-6-2003 and its concurrence letter dated 24-6-2003. However, the said two letters were totally out of context,and have no relevance and have never expressed the context and relevance in which they have been written and to that extent the material facts were suppressed by the petitioner. He has submitted that the petitioner has annexed only part of the ITB i.e. from Clause 24.3 onwards and suppressed earlier pages and Clauses of ITB. The petitioner has not mentioned the pre-bid meeting, issuance of addendum, its form of bid and summary of BoQs which gave total contract price, the pages of total price bid quoting the said total price based upon work items, units, unit price and total price according to the original tender documents and separately as well as simultaneously the addendum pages in terms of amended work items etc. All these facts are relevant and material to appreciate the nature of the Superintending Engineer's letter and petitioner's concurrence. The corrections made by the Superintending Engineer are not arithmetical errors contemplated by Clause 29.1 and the Superintending Engineer had no authority to correct those errors. The petitioner's so called concurrence is only an attempt to lower its bid by a fresh bid after the last date for submission of bids. and it is not permissible in view of the settled legal position. In this connection he relies on the decision of this Court in the case of N.D. Patel & Company vs. Manubhai Karsanbhai Parmar and Anr. (XXV (1) G.L.R. 386),wherein it is held that if there is deliberate suppression of important

and material facts, the High Court should not intervene with the award passed by the Labour Court. Mr. Vakil has further relied on the decision of this Court in the case of Vijay J. Gadhvi vs. State of Gujarat and Others (XXIX (2) G.L.R. page 902, wherein it is held that the petitioner must approach the Court with clean hands. There should not be suppression of material facts. If an interim order is obtained by suppressing material facts, the petitioner would be liable to be punished for contempt of Court for misuse and or abusing the process of Court.

28. Mr. Vakil has also relied on the decision of the Honourable Supreme Court in the case of G. Narayanaswamy Reddy (dead) by L.Rs. and another vs. Government of Karnataka and another (AIR 1991 SC 1726),wherein it is held that the relief under Article 136 is discretionary and a petitioner who approaches the Supreme Court for such relief must come with frank and full disclosure of facts. If he fails to do so and suppresses material facts, his application is liable to be dismissed.

29. Mr. Vakil has further submitted that the petition does not disclose any cause of action which warrants the petitioner to file this petition for non-award of the contract to the petitioner and the petitioner has no locus standi to file the present petition. He submitted that the petitioner's case is based solely on its claim to be the lowest bidder and an allegation that under the tender notice the contract is to be awarded to the lowest tenderer. The petitioner has neither disclosed the requirements for the award of the contract nor the averments that how the petitioner's bid has been determined to be substantially responsive to the tender documents. Even after respondent no.1-State has filed its reply to the effect, inter alia, that the petitioner's bid is not substantially responsive to the tender documents, the petitioner has not amended the petition.

30. Mr. Vakil has further submitted that under the World Bank Procurement Guidelines and even on the basis of the petitioner's form of bid, it cannot be said that the lowest bidder alone can claim award of the contract. The bidder who is not eligible for the award of the contract cannot challenge the award of the contract by invoking the writ jurisdiction of the High Court. Apart from tender conditions, law does not require that contract must be awarded to the lowest bidder. For this purpose, he has relied on the decision in the case of Prabhudasbhai Bhikabhai Patel vs. State of Gujarat and

Others (XXII G.L.R. 570), wherein it is held that giving of tender is an administrative decision. High Court cannot substitute its own decision in place of the decision of State Govt. Such decision to award contract can only be set aside if it is established that it is arbitrary and discriminatory. Merely because the lowest bid has not been accepted, it cannot be said that the decision is arbitrary. Efficient and satisfactory completion of work factor is to be taken into account while awarding the contract.

31. So far as the merits of the matter is concerned, Mr. Vakil has submitted that the petitioner's bid is not the lowest evaluated bid. He has submitted that the decision of the State Government is not liable to be judicially reviewed under Article 226 of the Constitution of India and even if it is to be reviewed, it cannot be held that the petitioner's bid is the lowest evaluated bid. Mr. Vakil has firstly submitted that there cannot be a judicial review of the decision taken by respondent no.1-State. The judicial review can be made only of the decision-making process. He has further submitted that the World Bank Procurement Guidelines stipulates that bidders shall not be requested or permitted to alter their bids after the deadline for receipt of bids. It is further submitted that the bid price read out at the bid opening shall be adjusted to correct any arithmetical errors. Even for the purpose of evaluation, adjustments shall be made for any quantifiable non-material deviations or reservations. Even the bid document itself provides that the borrower shall award the contract to the bidder whose bid has been determined (i) to be substantially responsive to the bid documents and (ii) whose offer is found to be of the lowest evaluated cost. The bid document further puts emphasis on one bid for one bidder. Mr. Vakil has, therefore submitted that under Clause 6.1 of ITB the petitioner could submit only one bid in the said bidding process and not two alternative bids - one in terms of original bid pages and the second in terms of addendum pages. The quotations in the addendum pages do not reflect in the title in the form of bid and in the summary of BoQ. Under Clause 14.1 of ITB the contract is required to be awarded based on the unit rates and prices in the BoQ submitted by the bidder. The petitioner remained present at the pre-bid meeting and has received the addendum pages. The petitioner's own case was that to the extent provided in the addendum, the contents of the original bid pages stood modified or substituted. However, the petitioner had quoted in the items against original bid pages and in the items against addendum pages. To the extent the work items and their

units in original bid documents were modified or substituted by the addendum the petitioner's quotations against the work items in the original bid pages were material deviations from bid documents. What applies to the original bid pages and the addendum cannot apply to the petitioner's bid and the petitioner cannot defend the same urging that the employer should have treated the petitioner's quotations in original bid pages as having been modified or substituted by addendum figures. The only alternative proposals permitted in the bid documents are those provided in ITB Clause 15 and 18. The so called errors corrected by the Superintending Engineer are not arithmetic errors contemplated by either subclause (a) or subclause (b) of Clause 29.1 and could not be corrected by respondent no.2-State or even by the petitioner in view of ITB Clauses 24.1, 24.3, 27.1 and 29.2.

32. Mr. Vakil has further submitted that the petitioner's bid cannot be said to be substantially responsive to the tender documents as the petitioner is the only bidder, which had taken recourse to a method of quoting two different rates for the very item in contradiction with the other bidders including respondent no.2. All these bidders had simply written " superseded by addendum "without quoting anything in those items in the original BoQs. Even the consultants have also reported that filling up both original BoQ and the addendum is not permissible and that it is a case of multiple bidding and an attempt by the bidder to use manipulative tactics contrary to the interest of respondent no.1-State and the World Bank's bidding requirements. Mr. Vakil has submitted that the petitioner's bid did not conform to all the terms and conditions and specifications of the bidding documents and it contained material deviations and reservations. The petitioner's quotations against work items in the original BoQ, which stood amended under the addendum are not in conformity with the bidding documents. Such quotations containing material deviations and reservations apparently affect in a very substantial way the scope, quality and performance of the works. It is not only inconsistent with the bidding documents but also with the rights of respondent no.1-State as well as bidder's obligations under the contract. The rectification would affect unfairly the competitive position of other bidders presenting substantially responsive bids. The petitioner has taken the advantage of knowing the bid price of other bidders, and thereby, claimed to be the lowest bidder in place of respondent no.2. Mr. Vakil has, therefore, submitted that the

petitioner's bid is not substantially responsive to the bid documents.

33. As far as the relief claimed in the petition is concerned, Mr. Vakil has submitted that since the petitioner's bid is not substantially responsive bid, it is rightly rejected by respondent no.1-State and it cannot be made responsive subsequently by correction or withdrawal of the non conforming deviation or reservation. Mr. Vakil has, therefore submitted that the petitioner who is found not to be eligible cannot challenge the decision of respondent no.1-State in awarding the contract to respondent no.2. Mr. Vakil has alternatively submitted that respondent no.2 is not disqualified in view of the representation dated 23-6-2003. The said representation does not amount to corrupt practice or fraudulent practice within the meaning of Clause 39 of ITB. Mr. Vakil has further submitted that the petitioner's submission to the effect that absence of his name in the arithmetic check in paragraph 7 of the evaluation bid report was an attempt to mislead the World Bank cannot be accepted as bids determined to be substantially responsive will be checked by respondent no.1-State for any arithmetical errors. The arithmetic check was, therefore, not required for the bids determined to be not substantially responsive.

34. Mr. Vakil has lastly submitted that the question of interference with the tender for execution of works in the World Bank aided project is required to be considered bearing in mind the question of public interest. Moreover, the present petition is filed by a rival bidder who claims to be the lowest bidder. Assuming that the petitioner is right the questions of saving to the public exchequer would be required to be considered in light of damage to the public exchequer by way of cost escalation as well as loss of the World Bank aid. The World Bank Procurement Guidelines as well as the bid documents require that the contract has to be awarded within the period of validity of the bids which expired on 4-1-2004. It would not be permissible now to respondent no.1 to award the contract to the petitioner. He has, therefore, submitted that this Court should not exercise its discretionary power under Article 226 by directing respondent no.1-State to award the contract to the petitioner.

35. In view of the aforesaid submissions and the settled legal position, Mr. Vakil has strongly urged that the decision taken by respondent no.1-State in issuing the letter of acceptance to respondent no.2 may

not be disturbed and the petition challenging the said decision may be dismissed at the very threshold.

36. We have heard at length the learned Advocates appearing for the respective parties and have dispassionately considered their arguments and view points on the controversy raised before us. We have travelled through the voluminous documents and papers having close proximity and connection with several issues raised in this petition. Plethora of judgments of this Court as well as that of the Honourable Supreme Court were cited, read, re-read and relied upon by the learned Advocates appearing for the respective parties. It is practically very difficult, if not impossible, for us to deal with all these submissions and contentions; nor do we think it necessary or expedient to express our opinion on all these issues. We, however, certainly concentrate on some of those issues which we find to be relevant and on which we intend to rest our decision.

37. The whole crux of the matter or the petitioner's main trump-card in this petition is the petitioner's plea that the petitioner has offered the lowest evaluated bid price, and there was no legal or justifiable reason not to award the contract in question to the petitioner. Another strong point, according to the petitioner, in its favour is that respondent no.1-State has shifted its stand frequently for the purpose of rejecting bid of the petitioner. Initially, the ground canvassed was that the petitioner's bid was not substantially responsive on account of multiple bidding, then, unfair practice and finally material deviation in the bid as a result of rectification which would unfairly affect the competitive position of other bidders.

38. If we appreciate, examine and evaluate the above contentions raised by the petitioner keeping in mind the norms and procedures, policy and practice, rules and regulations, and objects and principles contained in the bid documents,and submissions made and grounds urged by respondents, we hardly subscribe to the view of the petitioner. A long drawn argumentative process failed to convince us that the petitioner had offered the lowest evaluated bid price. It is an admitted position that on 17-5-2003, all the bidders including the petitioner submitted bids alongwith addendum, and their bids were opened on the same day in presence of all participating bidders who chose to attend and the bid price including any rebate or discount were announced. Thus, all the participating bidders became aware of the bid price and their standing in the order of ranking. As stated

earlier, respondent no.2 was found L-1 with total bid price after discount and or modification at Rs.99,40,36,488/-. The petitioner has not raised any objection against such ranking; nor any protest was lodged even thereafter for about one month. There was no need for the Superintending Engineer to seek confirmation of the petitioner about the final bid price, by sending communication dated 19-6-2003. Even if it is believed that it was necessary to send such communication, it was made clear therein that other aspects of the petitioner's bid were currently under detailed examination and clarification and that the petitioner would be informed under separate correspondence in due course. Simply by virtue of petitioner's confirmation by its reply dated 24-6-2003 no vested right was created in favour of the petitioner so as to enable it to claim the acceptance of its bid by respondent no.1-State. This is more so, when the prices of other bidders were made known to the petitioner and as a result thereof its reduced bid by virtue of such confirmation would unfairly affect the competitive position of other bidders.

39. As far as the allegation regarding shifting of stand by respondent no.1-State is concerned, we are of the view that these grounds for rejection of the petitioner's bid are not in the alternative or in substitution of one another, but after considering the cumulative effect of all the three grounds, respondent no.1-State has come to the conclusion that the petitioner's bid is not the lowest evaluated bid as it suffered from the vice of multiple bidding, unfair practice and material deviations. If we look at the bidding documents, Volume II of the tender documents deal with various provisions contained in Section 7 to 11. So far as Section 7 is concerned, the same deals with form of bid through the respective signatories. Respondent no.1 has come out with the case that on microscopic scrutiny of the tender documents of all the bidders, it was found in the case of the petitioner's bid that in Clause 1 in the said form of bid, the petitioner has made categorical averment that final bid price be determined in the tendering process after taking into consideration the addendum amongst various other matters. By virtue of Clause 7, the petitioner was aware that respondent no.1 was not bound to accept the lowest or any bid which it may receive. Considering the categorical assertion of the petitioner as well as summary BoQ, it appears to us that the petitioner had quoted rates both in original bid as well as in the addendum, and thereby, it had tried to take undue advantage of the situation of its having quoted two different rates for the very items one in the

original bid documents and the other in the addendum. It is also significant to note that the petitioner is the only bidder which had taken recourse to a method of quoting two different rates for the very items in contradistinction with the other bidders including respondent no.2 which had simply written " superseded by addendum" without quoting anything in those items in the original BoQ. In our opinion such an action of the petitioner, if exempted, puts the petitioner in a position where it can take undue advantage of agreeing to the rates in the original bid or in the addendum at its sweet will which would be totally unjust to other bidders. On these facts, if respondent no.1-State has come to the conclusion that the petitioner's bid was not the lowest evaluated substantially responsive bid, no infirmity can be found in such view.

40. It is also important to take note of the fact that the decision taken by respondent no.1-State is not, in any way, contrary to the bid documents. The complete procedure prescribed in the bid documents was meticulously followed by respondent no.1-State. The Consultant, namely Ms. Lea International Ltd. has taken into account all the aspects of the matter in respect of responsiveness of the petitioner's bid. While discussing the responsiveness to the commercial aspect of the bid documents, the consultant has observed in its report that if the addendum is considered, then, by making arithmetical correction, the petitioner's bid became the lowest. However, while considering the issue as to whether the petitioner's bid is responsive or not in light of the guidelines of the World Bank, the consultant is of the view that as per the guidelines of the World Bank, the petitioner's bid was not responsive. The consultant has given a specific finding to the effect that filling up of both original BoQ adjusted by hand and the addendum is not permissible and that it is a case of multiple bidding. The consultant was also of the view that the same can be construed as an attempt by the petitioner to use manipulative tactics contrary to the interest of respondent no.1-State and the World Banks bidding requirements. The consultant was also of the view that the petitioner could take undue advantage of post opening of tender since the petitioner knew the prices of other bidders and it had an advantage of its agreeing or disagreeing to the arithmetical corrections as required under Clause 29.2. According to the consultant, this was an unfair practice. The consultant has not merely stopped here. It has also recommended that the lowest substantially responsive bidder for the contract in question was respondent no.2. satisfying all

the criteria of a successful bid.

41. It is further to be noted that respondent no.1 -State has not taken any final decision merely on the basis of the consultant's evaluation report. It has sent the said report alongwith the proposal and recommendation to the World Bank for its verification and approval and also for seeking no objection certificate from the World Bank. In the letter dated 10-12-2003 addressed to the World Bank, after highlighting the points for consideration by the World Bank, the guidance was sought for by stating that if the interpretation put forward by respondent no.1-State was not correct or needed modification, the same would be conveyed to respondent no.1- State for its consideration. The World Bank was, therefore, made fully aware about the controversies that arose in respect of acceptance of bid and after exchanging correspondence and fax messages between the World Bank and respondent no.1-State, no objection certificate was issued by the World Bank, which ultimately resulted into the issuance of letter of acceptance in favour of respondent no.2 on 2-1-2004. We do not, therefore, find much substance or merits in the arguments canvassed on behalf of the petitioner that respondent no.1-State has wrongly rejected the petitioner's bid by raising one after another ground for which there was no base at all.

42. We are also not much impressed with the submission of Mr. Joshi that respondent no.1-State has deliberately remained silent about the role, reports, scope, nature and timing of enquiry by the consultant and that incorrect and misleading information had been furnished to the World Bank. As a matter of fact, all documents were sent to the World Bank. Entire bid evaluation report was forwarded to the World Bank, certain queries which have been raised by the World Bank have been duly replied to by respondent no.1-State and a conscious decision was taken by the World Bank in approving the recommendation made by respondent no.1 -State in issuing no objection certificate for accepting the bid of respondent no.2 by respondent no.1-State. It is not merely a mechanical process; nor the World Bank has acted as a rubber stamp. We, therefore, do not think it fit and proper to interfere with the action of respondent no.1-State which is based on not merely the consultant's report, but also approved by the World Bank.

43. Since, we are satisfied on merits of the matter that the petitioner's bid was not the lowest evaluated bid, we do not find it necessary or expedient to consider

the issues raised by respondent no.2 with regard to the amendment made in the petition, misstatement and suppression of material facts by the petitioner, issue regarding mala fide having not been raised in the petition, the petitioner having no locus standi to challenge the award of contract to respondent no.2 etc. The view which we are taking is duly supported by a catena of decisions. The whole attempt of the petitioner was to challenge the decision and not the decision-making process. Even if it is assumed that the decision-making process is challegned, we do not find any infirmity in the decision-making process adopted by respondent no.1 -State. Even if some defect is found in the decision-making process, the Honourable Supreme Court has observed in Air India Ltd.'s case (Supra) that the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on making out of a legal point. Looking to the larger public interest involved in the present matter, we are of the view, that our intervention is not at all required or warranted. In the present case, the difference between the bid of the petitioner and respondent no.2 is about Rs.85,00,000/- in a contract worth about Rs.99,00,00,000/-. As against this, it is a contract of great public importance and also a World Bank aided project. Except monetary aspect of the matter, there is no foundation for challenging the purity, transparency, bona fides and rationality of the State action and since no illegality has been committed by respondent no.1 -State there is no question of perpetuating or fructifying the alleged illegality. Even otherwise, under the tender documents itself a discretion is given to respondent no.1-State. A right is conferred under Clause 34 of ITB on respondent no.1-State either to accept or reject any bid and to annul the bidding process and reject all bids at any time prior to award of contract without there being any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for its action. Even if it is believed that this discretion is not an absolute discretion and the Court has every power to go into reasonableness of such discretion, in the present case, we have not found anything to show that respondent no.1-State has not correctly exercised its discretion while accepting the bid of respondent no.2, which is reasonable or based on sound principles of law, equity or justice or in no way contrary to the bid documents or World Bank Guidelines. One should not forget that, after all, it is a contractual matter and the power of the writ Court under Article 226 is

circumscribed. Based on the decision of the Honourable Supreme Court in the case of Rajasthan Cooperative Dairy Federation Ltd. (Supra), it is open for respondent no.1-State not to enter into any legal relationship with the petitioner, as there is no binding legal relationship between the petitioner and respondent no.1-State at this stage, and respondent no.1 is entitled to look at the totality of circumstances in deciding whether to enter into a binding contract with the petitioner or not. This does not mean that principle of judicial review is totally denied so far as exercise of contractual powers of Government bodies are concerned. However, it is necessary to prove that the decision taken by respondent no.1- State is an arbitrary decision or it is based on favouritism. It is also to be proved that the powers are not exercised in the larger public interest or that the contract was awarded for some collateral purpose. In the present case, we have not found any mala fides or favouritism in the acceptance of bid of respondent no.2 by respondent no.1-State. We are of the view that none of the criterias laid down by the Honourable Supreme Court in the case of Asia Foundation and Construction Ltd. (Supra), has been satisfied, justifying our interference in the grant of contract in favour of respondent no.2.. After strict compliance with the rules and regulations contained in the tender documents as well as the World Bank Guidelines, respondent no.1-State has rejected the bid of the petitioner and accepted that of respondent no.2 , and this action deserves to be upheld in view of the decision taken by the Honourable Supreme in West Bengal State Electricity Board's case (Supra) as relaxation or waiver of the rule or condition unless provided under ITB, by the State or its agencies in favour of one bidder would create justifiable doubts in the minds of other bidders and would impair the root of transparency and fairness and provide room for manipulation to suit the needs of the State agencies in picking and choosing a bidder for awarding contracts, and hence, adherence to ITB or rules is the best principle to be followed and it is also in the best public interest.

44. Considering the above facts and circumstances, and having due regard to the guiding principles propounded by the Apex Court from time to time, we are of the view that the challenge made by the petitioner against the action of respondent no.1-State is totally unfounded, meritless and it deserves no interference by us while exercising our extraordinary, constitutional, plenary and prerogative writ jurisdiction under Article 226 of the Constitution of India. The petition, therefore, fails. Notice is discharged with no order as

to costs.

(J.N.Bhatt,J.)

(K.A.Puj,J.)

stanley-kap.

45. At this stage, learned Counsel for the petitioner states that in order to facilitate the petitioner-Company to challenge this judgment before the higher forum, the operation of the judgment is sought to be stayed for two weeks, which is opposed by the learned Counsel appearing for the respondents.

46. After having given our anxious thoughts to the entire factual profile and the celebrated case law, whereby certain proposition involved in this petition, at this stage, we are extremely unable to subscribe the request to pass the order suspending our judgment for two weeks as requested. We, therefore, plead our inability to accept the request and the same is rejected.

(J.N.Bhatt,J.)

(K.A.Puj,J.)

stanley-kap.